Thompson v. Cantwell, et al., Nos. 04-36157 and 05-35969

FERGUSON, Circuit Judge, dissenting:

The majority holds that a merger has occurred as a matter of law regardless of the parties' intentions. I respectfully dissent.

In *Baxter v. Redevco, Inc.*, 566 P.2d 501, 504 (Or. 1977) (citation omitted), the case upon which the majority relies, the Supreme Court of Oregon reiterated the following general rule: "Where the owner of premises acquires an outstanding mortgage thereon, his intention is the controlling factor as to whether there is a merger." *See also South Beach Lumber Corp. v. Swank*, 311 P.2d 1018, 1023 (Or. 1957); *Lothstein v. Fitzpatrick*, 138 P.2d 919, 924 (Or. 1943); *Barber v. Hartley*, 298 P. 226, 229-30 (Or. 1931); *Katz v. Obenchain*, 85 P. 617, 620 (Or. 1906); *Watson v. Dundee Mortgage & Trust Inv. Co.*, 8 P. 548, 552-53 (Or. 1885). The court carved out an exception where the mortgagor had sold the property at a discount[1] and the purchaser-owner had assumed payment of the mortgage; in that case, when the purchaser-owner later acquired the mortgage, the debt and security interest merged, regardless of the purchaser-owner's intent. *Baxter*, 566 P.2d at 504 & n.2.

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[1] The majority suggests that the discount in *Baxter* was merely incidental, but the Oregon Supreme Court's opinion is more accurately read as treating the discount as a fact essential to its holding. *Baxter*, 566 P.2d at 504 & n.2.

This exception to the general rule does not apply here, where the grantor expressly agreed to pay the debt, and there exists a dispute of fact as to whether the purchase price included a discount. The *Baxter* court assumed a fact pattern in which "[the grantee's] bargain included as part of the price the amount of the mortgage debt." *Id.* at 504 (quotation omitted). The court further explained, "having deducted this debt from the purchase price he paid, the grantee cannot now require the mortgagor to pay the debt or any part of it." *Id.* at 505 (quotation omitted).

The Oregon Supreme Court never addressed the issue of whether intent is relevant to merger where the grantor expressly agreed to pay the mortgage debt and the fact of a discount is disputed. *Baxter* therefore does not dictate the outcome, and our task is to "predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *S.D. Meyers, Inc. v. City & County of S.F.*, 253 F.3d 461, 473 (9th Cir. 2001) (quotation omitted).

Other decisions, treatises, and the relevant restatement all indicate that there should be no merger, because it would contradict the clearly expressed intent of the

parties.[2] First, the very treatise upon which *Baxter* relied specifies that where the mortgagor was bound by agreement with the owner to pay off the debt, whether there is a merger depends on the intent of the owner. *See* George E. Osborne, Handbook on the Law of Mortgages § 274, at 554 (2d ed. 1970) (stating that contract claim survives assignment of mortgage and that availability of merger defense depends on intent)*; see also* 1 Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 616, at 590 (4th ed. 2002). Additionally, other treatises on property and mortgages explain that the rigid common law doctrine of merger is practically extinct;[3] it is well-settled that the modern doctrine depends on the intentions of the parties, and courts still will not apply it when merger would work an injustice or violate principles of equity. 28 Am. Jur. 2d Estates § 425 (2006); 31 C.J.S. Estates § 130 (2006); 55 Am. Jur. 2d Mortgages § 1342 (2006); 59 C.J.S.

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[2] The trust deed in this case included an explicit anti-merger clause, which read as follows: "Merger - There shall be no merger of the interest or estate created by this deed of trust with any other interest or estate in the property at any time held by or for the benefit of lender in any capacity without the written consent of lender."

[3] The Third Restatement of Mortgages provides a detailed history of the doctrine of merger and explains that merger does not apply. *See* Restatement (Third) of Property: Mortgages § 8.5 cmt. a, c (1997) ("The one situation in which an owner can sue another to recover a payment of the obligation is where the owner acquires title subject to the mortgage but pays the full purchase price for the property.").

Mortgages §§ 361, 444, 448 (2006). Finally, other courts have supported this view and disfavored mergers generally. *See, e.g.*, *Factors' & Traders' Ins. Co. v. Murphy*, 111 U.S. 738, 743-44 (1884); *The Bergen*, 64 F.2d 877, 880 (9th Cir. 1933); *Kolodge v. Boyd*, 105 Cal. Rptr. 2d 749, 759 (Cal. Ct. App. 2001); *Dunkum v. Macek Bldg. Corp.*, 176 N.E. 392, 394 (N.Y. 1931). Given the Oregon Supreme Court's long history of ruling that merger may occur only in conformance with parties' intentions; given that the anti-merger clause in this case clearly expressed the parties' intent to avoid any merger; given the secondary sources indicating that merger would not apply where the mortgagor is obligated by agreement to pay the debt and the purchase price was not discounted; and given the case law demonstrating that merger is generally disfavored, I believe Oregon's highest court would find no merger.

I therefore respectfully dissent.[4]

[4] Because I would find that the defendants have not prevailed, I also dissent from the court's conclusion that the District Court properly awarded attorneys' fees to the defendants.